



BEFORE THE PUBLIC UTILITIES COMMISSION OF THE STATE OF CALIFORNIA

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Order Instituting Rulemaking on Regulations Relating to  
Passenger Carriers, Ridesharing, and New Online-  
Enabled Transportation Services

Rulemaking 12-12-011  
(Filed December 20, 2012)

**REPLY COMMENTS OF LYFT, INC. RE: ASSIGNED COMMISSIONER'S RULING  
INVITING/INSTRUCTING PARTY COMMENTS ON BACKGROUND CHECKS OF  
PROSPECTIVE TRANSPORTATION NETWORK COMPANY DRIVERS**

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Lyft, Inc. (“Lyft”) submits the following comments in reply to opening comments on the Assigned Commissioner’s June 22, 2016 Ruling Inviting/Instructing Party Comments On Background Checks Of Prospective Transportation Network Company Drivers.

**I. The Opening Comments Reflect a Consensus That Fingerprint Background Checks Would Create Unnecessary Barriers to Participation and Harm the Riding Public the Commission Seeks to Benefit**

A wide variety of parties submitted comments in response to the Assigned Commissioner’s background check ACR. The vast majority of those commenters were in agreement that a fingerprint-based background check requirement would not enhance public safety and would instead create unnecessary barriers to participation, stifle innovation, and disproportionately disadvantage those who can least afford its negative impact.<sup>1</sup> Those opposed to the imposition of a fingerprint background check requirement – including the Greenlining Institute, Technet, California Chamber of Commerce, Internet Association, Engine, CalInnovates and the NAPBS – are a diverse group of organizations representing diverse constituencies. Yet, one thing on which they all agree is that a fingerprint-based background check requirement is unnecessary and would harm the very riding public that the Commission seeks to benefit.

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<sup>1</sup> See Opening Comments Of The Technology Network (“Technet”) Addressing Mandated Fingerprinting Of Transportation Network Company Drivers (“Technet Comments”); Comments of Engine (“Engine Comments”), Opening Comments Of The Internet Association Addressing Use Of Fingerprint-Based Background Checks Opening (“IA Comments”), Comments Of The Greenlining Institute On Background Checks Of Prospective Transportation Network Company Drivers (“Greenlining Comments”); Opening Comments Of The National Association Of Professional Background Screeners On Background Checks Of Prospective Transportation Network Company Drivers (“NAPBS”); Opening Comments Of Rasier-Ca, LLC On Assigned Commissioner’s Ruling Inviting/Instructing Party Comments On Background Checks Of Prospective Transportation Network Company Drivers (“Rasier Comments”);

Indeed, even SFO/SFMTA, who in the past have taken the position that fingerprint-based background checks are the *only* way to ensure public safety, now acknowledge that fingerprint checks may miss important criminal history and that a properly conducted commercial background check may locate records the DOJ cannot.<sup>2</sup> However, rather than agreeing that the existing background check requirement is appropriate, or proposing standards for a properly conducted commercial check, SFO/SFMTA instead now advocate for what they call a “hybrid” system. In reality, however, it is not a hybrid system at all, but an unprecedented proposal to single out TNCs for a *double*-background check requirement that would apply to no other category of transportation provider.<sup>3</sup> The problem with this unprecedented proposal is that it would not enhance public safety in any meaningful way while at the same time suffering from all of the well-documented disadvantages of a fingerprint background check. It would also unfairly penalize TNC drivers by imposing a uniquely burdensome requirement on them alone, despite the numerous safety advantages TNCs have over more traditional transportation alternatives, such as real-time GPS tracking, pre-identification of drivers and passengers, cashless payment, two-way ratings, and a permanent record of every ride. There is simply no rational basis for singling out TNC drivers for this unprecedented requirement.

Equally important, since the request for comments was issued, the California Legislature has passed AB 1289 with overwhelming bipartisan support.<sup>4</sup> In voting to approve AB 1289, the Legislature expressly affirmed the propriety of using commercial background checks for TNC drivers and rejected proposals to impose a fingerprint-based background check requirement. Though the bill has not yet been signed into law, it reflects the carefully considered views of the legislature that appropriately conducted commercial background checks are effective and reliable and that the negative impact of imposing a fingerprint requirement outweighs any potential upside.

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<sup>2</sup> Opening Comments Of San Francisco International Airport And San Francisco Municipal Transportation Agency To Assigned Commissioner’s Ruling Inviting/Instructing Party Comments On Background Checks Of Prospective Transportation Network Company Drivers (“SFO Comments”), p. 1.

<sup>3</sup> Because California law limits those who may access DOJ fingerprint criminal history information, and state and federal law limit the direct distribution of commercial background checks to state agencies, there is no such thing as a “hybrid” background check that would combine a commercial background check with a fingerprint-based search of the California DOJ criminal history database. See Penal Code §11105; 15 U.S.C. § 1681f; Civil Code § Section 1786.12(c), (d)(3).

<sup>4</sup> See [http://leginfo.ca.gov/faces/billVotesClient.xhtml?bill\\_id=201520160AB1289](http://leginfo.ca.gov/faces/billVotesClient.xhtml?bill_id=201520160AB1289) (AB 1289 passed the Senate on a 39-0 vote and the Assembly on a 70-4 vote); see further analysis of AB 1289 below.

Lyft urges the Commission to follow the Legislature’s lead and reject calls to impose an unnecessary and unwarranted fingerprint-based background check requirement.

## **II. There Is No Rational Basis for Singling Out TNC Drivers for a Double Background Check Requirement**

### **A. A Duplicate Background Check Requirement Would be Unnecessary and Unfair**

Lyft is pleased to see that parties who have long advocated requiring TNC drivers to submit to fingerprint-based background checks now acknowledge for the first time that fingerprint checks have significant shortcomings and, as a result, may not detect important criminal history information.<sup>5</sup> To their credit, these parties further acknowledge that a “well-resourced commercial background investigation firm may have the ability to locate records that the CA DOJ cannot.”<sup>6</sup> Where we continue to disagree, however, is with their unprecedented proposal to require TNC drivers to undergo *both* a fingerprint-based background check *and* a commercial background check – a requirement that would apply to no other for-hire drivers in California, or to Lyft’s knowledge, nationwide. Indeed, other transportation carriers regulated by the Commission, including TCPs and PSCs, have no criminal background check requirement at all.<sup>7</sup> Although labeled as a “hybrid” approach, in reality it is not a hybrid but rather a duplicative and uniquely burdensome double-background check requirement that would apply only to prospective TNC drivers.<sup>8</sup> Because California law limits who may access DOJ criminal history information, there is no such thing as a hybrid background check that would encompass both a commercial background check and a search of the California DOJ criminal history database.<sup>9</sup> Thus, the proposed “hybrid” check is really just a euphemism for an unprecedented double background check requirement.

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<sup>5</sup> SFO Comments, p. 1.

<sup>6</sup> *Id.* at p. 13.

<sup>7</sup> *See*

[http://www.cpuc.ca.gov/uploadedFiles/CPUC\\_Public\\_Website/Content/Licensing/Passenger\\_Carriers/Yellow%20Paket%20revised%208.11.16.pdf](http://www.cpuc.ca.gov/uploadedFiles/CPUC_Public_Website/Content/Licensing/Passenger_Carriers/Yellow%20Paket%20revised%208.11.16.pdf). Nor is Lyft aware of any other for-hire drivers who are required to undergo two separate criminal background checks.

<sup>8</sup> SFO Comments (“We therefore urge the Commission to adopt a hybrid solution, employing both fingerprint-based and name-based criminal history information.”).

<sup>9</sup> *See* Penal Code § 11105 (precluding dissemination of DOJ criminal history to CRAs); *see also* 15 U.S.C. § 1681f (consumer reporting agency may furnish only limited categories of information to a government agency, which includes “identifying information respecting any consumer, limited to his name, address, former addresses, places of employment, or former places of employment.”); *Soghomonian v. U.S.*, 278 F.Supp. 2d 1151, 1163-64 (E.D. Cal. 2003), *vacated by stipulation by Soghomonian v. United States*, No. CIV.F 99 CV 5773 SMS, 2005 WL 1972594 (E.D. Cal. June 20, 2005) (FCRA precludes sharing reports with government agencies); Civil Code § Section 1786.12(c), (d)(3) (in accord).

As explained below, the rationales offered in support of this double-background check proposal do not withstand scrutiny. The requirement would not offer any demonstrable benefit to public safety over a properly verified and conducted commercial background check, while at the same time suffering from the numerous disadvantages of fingerprint-based background checks, including a cost that would be prohibitive for many prospective drivers and lengthy delays associated with processing such checks.<sup>10</sup>

## **B. A Double Background Check Requirement Would Still Result in Lengthy Delays**

As Lyft explained in its Opening Comments, the California DOJ concedes that the legally-mandated genuine effort investigation to locate disposition information for fingerprint-based checks is a time-consuming, manual process that takes an “indeterminate” amount of time to complete.<sup>11</sup> And because substantial percentages of fingerprint records lack disposition information – by the most recent count, nearly 60% in California and half in the FBI database<sup>12</sup> – a genuine effort search is a routine event, resulting in routine delays in processing such checks. Indeed, the FBI reports on its website that the time frame for processing an individual request for a criminal history is 12-14 weeks.<sup>13</sup> Compounding these issues, reports from non-profits focused on social justice issues indicate that where an inaccurate criminal history record is reported it may take several months for the applicant to navigate the byzantine process for correcting inaccurate history in the FBI criminal history database, imposing a substantial economic burden on those least able to afford it.<sup>14</sup> This is because fingerprint-based background checks are not subject to the FCRA or the robust consumer-friendly procedures enumerated therein for challenging inaccurate information.<sup>15</sup> These delays in processing fingerprint-based background checks are not in any way

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<sup>10</sup> Although SFO/SFMTA state in the introduction to their Opening Comments that their proposal is akin to the process used in New York City, New York City does not use any kind of “hybrid approach.” New York City has contracted with Morphotrust as “the exclusive live scan fingerprinting provider for the New York Division of Criminal Justice Services.” See <https://www.identogo.com/locations/new-york>. Morphotrust processes fingerprint-based background checks, similar to those conducted at Live Scan locations in California, which query state and FBI fingerprint databases. See also [http://www.nyc.gov/html/tlc/downloads/pdf/industry\\_notice\\_16\\_12.pdf](http://www.nyc.gov/html/tlc/downloads/pdf/industry_notice_16_12.pdf)

<sup>11</sup> <https://oag.ca.gov/fingerprints>

<sup>12</sup> See Declaration Of Daniel T. Rockey In Support Of Comments Of Lyft, Inc. Re: Assigned Commissioner's Ruling Inviting/Instructing Party Comments On Background Checks Of Prospective Transportation Network Company Drivers (“Rockey Decl.”), Exhibit 1, at Table 1.

<sup>13</sup> See <https://www.fbi.gov/services/cjis/identity-history-summary-checks>

<sup>14</sup> Rockey Decl., Exh 6, p. at 22 (“merely needing to rely on the appeal process disadvantaged workers and caused financial hardship for many.”).

<sup>15</sup> *Id.* at 28 (re proposed Bill HR 5300 to add FRCA-like protections for fingerprint-based checks); see also <https://www.govtrack.us/congress/bills/111/hr5300> (HR 5300 died in previous Congress).

ameliorated by layering a commercial background check on top of a fingerprint background check requirement. They would continue to present substantial impediments to individuals seeking to drive for TNCs not justified by any substantial benefit to public safety.

**C. A Double Background Check Requirement Would Create Unnecessary Barriers, Especially for Those Drivers Who Drive Only Occasionally**

Nor does the substantial upfront cost of obtaining a fingerprint-based background check go away by requiring both a fingerprint *and* a commercial background check. Because fingerprint-based checks in California are initiated by the applicant going to a Live Scan location to provide prints, the applicant must bear some or all of the cost upfront. This cost can be prohibitive for many drivers; in particular, for those who drive only occasionally and not as a primary occupation – which constitutes the vast majority of Lyft drivers<sup>16</sup> – and are therefore less able to spread the cost over time. And for those drivers for whom it is not strictly prohibitive, the imposition of a hefty upfront cost can nevertheless create substantial obstacles that impact the economically disadvantaged most acutely. It may take weeks for a fingerprint-based check to resolve – or months if the applicant must challenge an inaccurate result – during which time the applicant is unable to generate income to offset the cost or cover other living expenses.<sup>17</sup> The imposition of significant upfront costs acts as a deterrent to participation, tends to discourage casual TNC drivers from applying, and can be expected to dramatically reduce the number of drivers on the road and lead to longer wait times for passengers -- harming the very TNC passengers the proposal is ostensibly intended to benefit. A double background check requirement would also compound the substantial cumulative burden on prospective drivers that increasingly rigorous PUC regulations already impose.<sup>18</sup> Adding yet another layer of requirements on top of existing ones would negatively impact both prospective TNC drivers and the many thousands of people that regularly rely on them for their critical transportation needs.

**D. Unproven and Unsubstantiated Anecdotes Are Not a Sound Basis for Establishing Important Commission Policy**

Singling out TNCs for a burdensome two-check requirement is also unwise and unwarranted because the reasons offered for imposing a two-check requirement simply do not hold

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<sup>16</sup> 79% of drivers on the Lyft platform use Lyft to supplement their income, rather than as a primary occupation.

<sup>17</sup> Rockey Decl., Exh 6, p. at 22.

<sup>18</sup> TNCs have not yet been able to assess the full impact on driver availability resulting from the recently imposed CBAR inspection requirements, which continue to be implemented across California.

up to scrutiny. The primary rationale for layering a fingerprint-based check on top of a commercial check is the assertion that “TNC background checks are particularly susceptible to error when individuals use aliases to pass the background checks.”<sup>19</sup> In support of this contention, SFO/SFMTA offer a series of now-dated anecdotes in which applicants allegedly evaded Uber’s background check process.<sup>20</sup> Although these anecdotes certainly warranted an inquiry into what happened and why, one-off examples alone do not demonstrate that commercial background checks are inherently vulnerable to fraud and should not be the basis for establishing broader policy. There are, of course, countless examples of taxi drivers committing a variety of heinous crimes -- a handful of them are cited here.<sup>21</sup> And although taxis have not endured the same media scrutiny as TNCs in recent years, there is no shortage of reports documenting instances of taxi drivers evading fingerprint background checks and continuing to provide countless rides despite convictions for serious crimes.<sup>22</sup> Yet, to Lyft’s knowledge, no one is advocating for a double-background check requirement to be imposed upon taxi drivers. Indeed, the very same parties advocating for a double-background check requirement here are the agencies responsible for regulating taxis. And yet, there is no indication whatsoever that they intend to impose this same requirement on the taxi drivers they are charged with regulating. In the end, anecdotal examples

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<sup>19</sup> SFO Comments, p. 8.

<sup>20</sup> *Id.*

<sup>21</sup> See, e.g., <http://blog.sfgate.com/crime/2012/05/30/s-f-cabbie-attacks-fare-with-tire-iron/>  
<http://blog.sfgate.com/abraham/2010/06/13/angry-violent-sf-luxor-cab-driver-update/>  
<http://www.opposingviews.com/i/society/assault-victim-run-over-cab-bystanders-watch-video>  
<http://mynews1a.com/orange-county/2016/07/05/anaheim-taxi-driver-pleads-guilty-to-raping-customer/>  
<http://www.latimes.com/socal/hb-independent/news/tn-hbi-me-0714-rape-sentence-20160713-story.html>  
<http://www.uniondemocrat.com/localnews/4212631-151/man-pleads-not-guilty-to-attempted-murder-in?referrer=bullet4>  
<http://www.sfchronicle.com/news/article/Road-raging-cabbie-pepper-sprays-2-men-in-S-F-6260755.php>  
<http://www.sfchronicle.com/news/article/Teen-struck-and-killed-by-taxi-in-San-Francisco-6209773.php>  
<http://www.sfchronicle.com/bayarea/article/Man-struck-by-taxi-in-S-F-s-Marina-district-5801255.php>  
<http://www.sfchronicle.com/news/article/Cabbie-s-sudden-medical-emergency-suspected-in-9182355.php>  
<http://www.sfchronicle.com/crime/article/Taxi-driver-roommate-arrested-for-sexually-6159032.php>  
<http://www.sfgate.com/bayarea/article/Taxi-driver-sent-to-mental-hospital-for-murder-3221341.php>  
<http://www.sfgate.com/crime/article/Xiana-s-murderer-killed-Pinole-girl-police-say-3225976.php>  
<http://denver.cbslocal.com/2016/07/01/former-cab-driver-sentenced-in-sex-assault-case/>  
<http://ksn.com/2016/05/28/kansas-city-area-cab-driver-accused-of-sex-attack/>  
<http://ktla.com/2016/03/02/virginia-cab-driver-pleads-guilty-to-murders-of-hannah-graham-and-morgan-harrington/>  
<sup>22</sup> <http://www.dallasobserver.com/news/yellow-cab-conducts-regular-background-checks-thats-not-what-it-said-under-oath-7125051> ; <http://fox2now.com/2015/07/27/cabbies-with-criminal-records-can-continue-driving-depending-on-the-crime/> (“But Abdi got a license several years ago, despite a record of at least eight previous arrests.”); <http://abc13.com/archive/9515494/> (“Hundreds of Houston cabbies are driving despite prior criminal convictions including drunk driving, driving without a license, drug dealing, and domestic violence, records obtained by ABC-13 show.”); <http://thescoopblog.dallasnews.com/2016/02/which-is-safer-uber-or-a-taxi.html/> (“... there are plenty of stories of taxi drivers committing violent crimes.”).



regarding one TNC's experience from several years ago – none of which were actually proven in a court of law – cannot properly serve as a basis for broader policy prescriptions for TNCs as a whole.<sup>23</sup>

**E. Even If Accurate, Anecdotes Regarding the Use of Aliases Do Not Undermine the Use of Commercial Checks But Rather the Process Used to Verify Identity**

SFO/SFMTA contend that the primary cause of missed criminal history in the examples cited in their Opening Comments was the use of an alias by the driver. Lyft is not privy to the information upon which SFO/SFMTA premised the allegations in their prior complaint and SFO/SFMTA have not placed such information into the record; relying instead on allegations of their prior complaint. However, even assuming that assertion to be true, an allegation that a driver evaded a commercial background check by providing an alias is not in actuality a criticism of commercial background checks *per se*, but rather a criticism of the identity verification process employed in conjunction with the running of the commercial check. As Lyft explained in its Opening Comments and re-emphasizes here, neither fingerprint-based background checks nor commercial background checks are designed to verify identity. The efficacy of both fingerprint-based checks and commercial checks depends in significant part upon the process used to verify identity when conducting the check. In the *absence* of an effective verification process, an applicant *might* be able to fool either type of test – a commercial check by providing an alias and false SSN (and hoping that the cross-referencing of other personal information does not generate a mismatch), and a fingerprint check by having a friend with no criminal history provide his or her prints. In the former instance, had the individual's identity been properly verified at the outset by reference to a government-issued photo ID, the alias would not match the ID and the applicant should be rejected. Conversely, in the latter instance, an unverified fingerprint-based background check will provide a clean result even if the actual applicant were a convicted felon. Thus, the fact that an individual may have been able to evade a commercial background check by providing an alias speaks to the rigor and adequacy of the identity verification process, not to the efficacy of the commercial background check itself.

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<sup>23</sup> SFO/SFMTA cites an amount of money which Uber agreed to pay to resolve the allegations as evidence of their validity. It would be improper, however, for the Commission to presume the validity of allegations in a complaint because a company agreed to pay money to settle a lawsuit, rather endure the uncertainty and expense of a jury trial.

Importantly, as Lyft also previously pointed out, fingerprint-based background checks in California *do not require presentation of a photo-ID for identity verification* and instead permit an applicant to “verify” identity by simply showing the Live Scan operator a marriage certificate, a utility bill and a canceled check; neither of which actually provides positive identification of the applicant.<sup>24</sup> In contrast, Lyft’s background check process requires every driver applicant to present a government-issued photo ID to a Lyft representative to verify their identity, in addition to cross-checking that information against other provided documentation (e.g., registration, insurance information) and information returned from a driving record check. This identity verification process – similar in kind to the process used by TSA, US Customs and Border Protection, and other government agencies to verify an individual’s identity – is designed to eliminate the possibility of an individual evading a background check by providing an alias or false SSN. Because California’s verification process for fingerprint-based background checks permits verification without a photo ID, Lyft’s process has distinct advantages over fingerprint checks in preventing identity fraud. An additional fingerprint-based background check would not materially diminish the risk of identity fraud as compared to a properly authenticated commercial background check, and therefore would not enhance public safety.

**F. The Fact That Commercial Checks Query the National Sex Offender Registry Does Not Make Them Any Less Effective**

A second rationale offered in support of a double-background check requirement on TNCs is the assertion that commercial providers such as Sterling and Checkr query the United States Department of Justice Sex Offender Registry,<sup>25</sup> which SFO/SFMTA contend is inadequate because individuals convicted of certain offenses may petition for exclusion from the public website.<sup>26</sup> In

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<sup>24</sup> See Rockey Decl., Ex. 3, at p. 5-6.

<sup>25</sup> Lyft wishes to make a minor correction to a description of Sterling’s background check process appearing in its Opening Comments. In describing the process used by Sterling, Lyft listed separately the “Enhanced Nationwide Criminal Search” and the Department of Justice Sex Offender Registry. See Opening Comments, p. 17. To be precise, the search of the DOJ Sex Offender Registry occurs as part of the Enhanced Nationwide Criminal Search, rather than as a standalone search.

<sup>26</sup> SFO Comments, p. 9. Lyft notes here that there is disagreement among the parties as to whether California DOJ background checks routinely include reporting of status on the California Sex Offender Registry or pending arrests where the individual is awaiting trial. As Lyft explained in its Opening Comments, Penal Code §§11105(k) – (o) authorize reporting of pending arrests and sex offender registry status for certain enumerated categories of applicants. Furthermore, the California Department of Justice reported in response to a request for clarification that a DOJ background check does not routinely search the sex offender registry. See Rockey Declaration, ¶2, Ex. 2 (email from California Department of Justice stating that a DOJ background check “is obtained from fingerprint submissions, reported arrests and convictions, but not the actual Sex Offender Registry.”). In contrast, SFO/SFMTA contend that Penal Code §11105(p) provides for the reporting of pending arrests for all DOJ background checks. See SFO

support of this argument, SFO/SFMTA point to certain alleged incidents from their prior complaint against Uber, though the description of these incidents in SFO/SFMTA's comments is not actually consistent with what was alleged in the complaint,<sup>27</sup> and no evidence of the alleged incidents has been placed in the record. But regardless of the actual facts underlying these allegations, SFO/SFMTA *are* correct that California permits individuals convicted of certain sex-related offenses to petition the Department of Justice for exclusion from the Megan's Law public website. Pursuant to Penal Code §290.46, "certain offenders with less serious sexual offense histories, as specified, may apply to the Department of Justice for exclusion from the Internet Web site."<sup>28</sup> Petitioners bear the burden of proving to the DOJ that they meet the requirements for exclusion, but §290.46 does permit individuals convicted for certain "less serious" offenses to be excluded. Reasonable minds can disagree as to whether permitting low-level sex offenders to be excluded from the Megan's Law website is a sound policy, but the California legislature gave careful consideration to the arguments in favor of and opposed to such a policy and voted to permit it.

Significantly, in D. 13-09-045, the Commission itself ordered that background checks conducted by TNCs "must be a national criminal background check including the national sex offender database." D. 13-09-045, OP 4. It is generally presumed that in enacting regulations, agencies are aware of the current state of the law.<sup>29</sup> Furthermore, as explained in more detail below, the legislature recently passed AB 1289 with overwhelming bipartisan support and it too

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Comments at p. 3. If 11105(p) requires reporting of pending arrests in all cases, it would also routinely require reporting of sex offender registry status, *see* Penal Code §11105(p)(2)(B) [pending arrests], and (2)(C) [sex offender status], however, the DOJ says that it does not. Furthermore, Cal. Code Regs., tit. 11, § 723, a regulation enacted by the DOJ, provides that only arrests with disposition information may be reported and includes no exception for pending arrests awaiting trial. In light of SFO/SFMTA's argument that searching the sex offender registry is inadequate, the question of whether a fingerprint check searches the sex offender database may well be moot. However, the question as to whether DOJ fingerprint checks routinely report pending arrests awaiting trial remains an important unresolved issue regarding fingerprint-based background checks, as the courts have not had occasion to resolve this issue.

<sup>27</sup> Although SFO/SFMTA contends quite sensationally that Uber drivers #2 and #3 "provided 8,870 rides to unaccompanied minors while driving for Uber," the prior complaint actually alleges that the two drivers provided a total of 8,870 rides while driving for Uber, an unspecified number of which may have involved unaccompanied minors. *Compare* SFO Comments, p. 9-10 with Appendix A, p. 27-28.

<sup>28</sup> *See* Legislative History for Penal Code §290.46 at 2004 Cal. Legis. Serv. Ch. 745 (A.B. 488) (WEST); Penal Code §290.46(e).

<sup>29</sup> *People v. Mulcrevy* (2014), 233 Cal.App.4th 127, 132 ("The body enacting a new law is also 'deemed to be aware of statutes and judicial decisions already in existence, and to have enacted or amended a statute in light thereof.'").

chose to require that TNCs search the national sex offender registry.<sup>30</sup> The legislature was similarly cognizant of the limitations on the sex offender registry when it did so.<sup>31</sup> Thus, it is hardly a valid basis for criticism of TNC background checks that they comply with requirements imposed by the Commission and blessed by the legislature.

More to the point, however, a focus on the legal parameters of the public sex offender website is a red herring. Whether or not an individual is registered on the Megan's Law website, there is no reason to believe that a properly conducted commercial background check would be any less likely to identify a conviction for sexual offenses than a fingerprint background check. Indeed, it is precisely because commercial background checks such as those conducted by Sterling and Checkr *do not rely* on aggregate databases for completeness, and instead retrieve records directly from the local courts, that a properly conducted commercial background check is fully capable of detecting such convictions and may well do so more effectively than a fingerprint-based background check. For all of these reasons, the fact that commercial checks conducted by companies such as Sterling and Checkr search the national Sex Offender Registry is not a sound basis for imposing a burdensome and time-consuming double background check requirement.

#### **G. The Legislature Has Rejected a Fingerprint-Based Background Check Requirement for TNCs**

In a further bid to support a double-background check requirement, SFO/SFMTA cite to the legislative history of AB 1289, a bill that recently passed both the Senate and Assembly with strong bipartisan support and has been sent to the Governor for signature.<sup>32</sup> Although SFO/SFMTA argue that the legislative history supports the imposition of a fingerprint background check requirement, precisely the opposite is true. The legislative history actually confirms that the legislature carefully considered, and ultimately rejected, such a requirement.

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<sup>30</sup> [http://leginfo.legislature.ca.gov/faces/billCompareClient.xhtml?bill\\_id=201520160AB1289](http://leginfo.legislature.ca.gov/faces/billCompareClient.xhtml?bill_id=201520160AB1289) ("A transportation network company shall conduct, or have a third party conduct, a local and national criminal background check for each participating driver that shall include ... [a] search of the United States Department of Justice National Sex Offender Public Web site.").

<sup>31</sup> *Viking Pools, Inc. v. Maloney*, 48 Cal. 3d 602, 609 (1989) ("The Legislature is deemed to be aware of existing laws and judicial decisions construing the same statute in effect at the time legislation is enacted.").

<sup>32</sup> See [http://leginfo.legislature.ca.gov/faces/billVotesClient.xhtml?bill\\_id=201520160AB1289](http://leginfo.legislature.ca.gov/faces/billVotesClient.xhtml?bill_id=201520160AB1289) (AB 1289 passed the Senate on a 39-0 vote and the Assembly on a 70-4 vote).

SFO/SFMTA cite to a passage from one of many Floor Analyses of the bill in which the analyst offered her opinion that “a combination of name and social security checks with a biometric identifier, such as a fingerprint, would ensure the greatest level of accuracy, and therefore, the best protection of public safety and fairness to potential drivers.”<sup>33</sup> Along similar lines, an earlier analysis by the same analyst for the Senate Committee on Energy, Utilities and Communications stated that the “committee may wish to amend the bill to require the CPUC to consider requiring the use of biometric identifiers in administering criminal background checks.”<sup>34</sup> However, these citations tell an incomplete story. More recent Senate Analyses regarding the bill also weigh a number of arguments *against* imposing a fingerprint requirement and make clear that “[a]s currently drafted, this bill does not include fingerprinting or other biometric requirements as part of a background check.”<sup>35</sup> Confirming this view, the August 1, 2016 Analysis by the Senate Public Safety Committee likewise makes clear that the “purpose of this bill is to require transportation network companies to do a *non*-fingerprint based background check on their drivers.”<sup>36</sup> And the most recently issued Floor Analyses, including analyses issued on August 24 and August 30, 2016, drop the discussion of biometric identifiers and combination tests altogether.<sup>37</sup>

On August 31, 2016, the bill passed the Assembly, having unanimously passed the Senate on August 23. The version of the bill sent to the Governor omits any mention of a fingerprint requirement, and instead expressly authorizes the use of “commercial” background checks. As passed, AB 1289 provides, in pertinent part:

A transportation network company shall conduct, or have a third party conduct, a local and national criminal background check for each participating driver that shall include both of the following:

(A) A multistate and multijurisdiction criminal records locator or other similar *commercial* nationwide database with validation.

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<sup>33</sup> SFO Comments, p. 6. Although not specified, SFO/SFMTA appear to be quoting from the August 10, 2016 Senate Floor Analysis authored by Consultant Nidia Bautista. See

[http://leginfo.legislature.ca.gov/faces/billAnalysisClient.xhtml?bill\\_id=201520160AB1289](http://leginfo.legislature.ca.gov/faces/billAnalysisClient.xhtml?bill_id=201520160AB1289)

<sup>34</sup> [http://leginfo.legislature.ca.gov/faces/billAnalysisClient.xhtml?bill\\_id=201520160AB1289](http://leginfo.legislature.ca.gov/faces/billAnalysisClient.xhtml?bill_id=201520160AB1289) (Senate Committee on Energy, Utilities and Communications, 6/10/16, at p. 4).

<sup>35</sup> [http://leginfo.legislature.ca.gov/faces/billAnalysisClient.xhtml?bill\\_id=201520160AB1289](http://leginfo.legislature.ca.gov/faces/billAnalysisClient.xhtml?bill_id=201520160AB1289) (8/22/16 Floor Analysis).

<sup>36</sup> [file:///H:/Downloads/201520160AB1289\\_Senate%20Public%20Safety-%20\(1\).pdf](file:///H:/Downloads/201520160AB1289_Senate%20Public%20Safety-%20(1).pdf) (emphasis added).

<sup>37</sup> [http://leginfo.legislature.ca.gov/faces/billAnalysisClient.xhtml?bill\\_id=201520160AB1289](http://leginfo.legislature.ca.gov/faces/billAnalysisClient.xhtml?bill_id=201520160AB1289)

(B) A search of the United States Department of Justice National Sex Offender Public Web site.

(emphasis added).<sup>38</sup> Thus, the legislative history of AB 1289 plainly shows that the legislature considered arguments both in favor of and against a fingerprint-based background check requirement, and decided not to impose such a requirement. Indeed, this marks the fifth time in the last several legislative sessions that the legislature has considered -- and rejected -- calls to impose a fingerprint background check requirement.<sup>39</sup> However, this time, rather than merely rejecting a bill proposing such a requirement, the legislature affirmatively resolved the issue by expressly approving of the use of “*commercial*” background check services for TNC drivers. Although the Governor has not yet signaled whether he intends to sign the bill into law, the legislature has spoken on the issue of requiring a fingerprint-based background check and has determined that no such requirement should be imposed.

#### **H. The 1999 Report Cited by SFO/SFMTA Does Not Undermine the Use of Commercial Background Checks**

In their Opening Comments, SFO/SFMTA cite to a 1999 report entitled Interstate Identification Index Name Check Efficacy, which reports on a study involving Florida job applicants as evidence that commercial background checks are not as reliable as fingerprint-based checks.<sup>40</sup> Citing to the report, SFO/SFMTA state that “11.7% of the applicants who were determined to have fingerprint-verified criminal history records were indicated by name checks as not having criminal records (false negatives), and 5.5% of applicants who were determined not to have fingerprint-verified criminal history records were inaccurately indicated by name checks as having criminal records (false positives).”<sup>41</sup> Putting aside the fact that the cited study is now seventeen years old and thus does not reflect the current technology and processes employed in commercial background checks such as those conducted by Sterling and Checkr, a closer analysis reveals that the methodologies employed in the study raise a number of questions regarding its validity here, and further, that a key participant in the study, Martha Wright, the Bureau Chief of Criminal Justice Information Services for the Florida Department of Law Enforcement, actually reached precisely the opposite conclusion.

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<sup>38</sup> [http://leginfo.legislature.ca.gov/faces/billCompareClient.xhtml?bill\\_id=201520160AB1289](http://leginfo.legislature.ca.gov/faces/billCompareClient.xhtml?bill_id=201520160AB1289)

<sup>39</sup> In addition to AB 1289, AB 2777 (2106), AB 2777 (2016), AB 24 (2015), SB 1035 (2015) and AB 612 (2104) all considered a fingerprint background check requirement and all ultimately rejected it.

<sup>40</sup> SFO Comments, p. 10-11.

<sup>41</sup> SFO Comments, p. 10.

As a threshold matter, the authors of the study were careful to note that “the study assumed fingerprint searches to be free of errors.”<sup>42</sup> Thus, if a commercial check did not report a criminal history where a fingerprint check did, it was assumed that the commercial check, and not the fingerprint check, was erroneous.<sup>43</sup> As numerous reports have shown, however, including many cited in Lyft’s Opening Comments, an assumption that fingerprint checks are error free has been repudiated by subsequent analyses, including the Attorney General’s 2006 report on the FBI criminal history database and more recent analyses by the GAO and others.<sup>44</sup> This is important because the study also found that in the 13,983 instances in which a name check detected a disqualifying criminal history, the fingerprint check *failed* to detect the criminal history in 4,562 instances.<sup>45</sup> The study did not definitely resolve which of the checks – the name check or the fingerprint check – was actually in error. Along the same lines, in approximately one-third of the so-called false negatives – i.e., where the name check failed to report criminal history but it was determined that criminal history existed – the missed criminal history *was not actually in the FBI database*, and was instead tallied based on paper records.<sup>46</sup> Furthermore, the incidence of both false negatives and false positives was significantly influenced by the fact that only 3% of all submitted name checks included SSNs.<sup>47</sup> As the study authors explained, “the absence of an SSN from the data submitted to the name check process influences the rates at which false negatives and false positives occur.”<sup>48</sup> In contrast, every background check conducted by Lyft necessarily uses the applicant’s SSN, helping to ensure that relevant criminal history is detected and reported. Moreover, the study fails to explain how the identity of the individuals examined in the study was established prior to conducting a name-based search, making it difficult to draw any conclusions in comparison to the background checks conducted by Lyft, which require presentation of a photo-ID. Finally, as Lyft indicated in its Opening Comments, Ms. Wright issued her own report following the completion of the study and found that 62,545 of 62,697 attempts (99.8%) returned the exact same match for both fingerprint-based checks and name-based checks, and that “the

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<sup>42</sup> <http://www.bjs.gov/content/pub/pdf/iince.pdf>, at p. 22.

<sup>43</sup> *Id.*

<sup>44</sup> See Lyft Opening Comments, Response to Question 1.

<sup>45</sup> *Id.* at p. 55.

<sup>46</sup> <http://www.bjs.gov/content/pub/pdf/iince.pdf> at 50 (“The applicant is simply not in the III, as was the case for approximately one-third of the 1,252 false negatives among the employment and licensing applicant group.”).

<sup>47</sup> *Id.* at 49 (“[T]he FDLE usually does not include Social Security Numbers (SSNs) in the QH name checks it submits (i.e., only 3% of the name checks include SSNs).”).

<sup>48</sup> *Id.* at p. 52.

extremely high accuracy rate of the name searches makes these searches sufficient.”<sup>49</sup> Ms. Wright further concluded based upon the results of the study that until fingerprinting is considerably improved, “name searches are the only practical option for determining a criminal past.”<sup>50</sup>

In short, the study cited by SFO/SFMTA does not, in fact, undermine the efficacy of Lyft’s background checks and certainly does not provide a basis for imposing a double background check requirement here. As Lyft demonstrated in its Opening Comments, recent audits by local agencies of Lyft’s background check process found them to be an effective and reliable method of obtaining criminal history.<sup>51</sup>

### **III. CONCLUSION**

For all of the foregoing reasons, Lyft urges the Commission to follow the Legislature’s lead in rejecting proposals to impose a fingerprint-based background check requirement, including the double-background check requirement advanced by SFO/SFMTA here. The commercial background checks conducted by Lyft, which include an effective identity-verification process to guard against the use of aliases or false SSNs, are a highly effective and reliable method of ensuring public safety. Lyft respectfully requests that the current background check rules remain in place and that no fingerprint-based background checks be required.

Dated: September 12, 2016

**BRYAN CAVE LLP**

By:                     /S/                    

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<sup>49</sup> Rockey Decl., Exh. 19 (Martha Wright, “The Efficacy of Name-Based Searches For Other than Criminal Justice Purposes,” Florida Department of Law Enforcement), at p. 10.

<sup>50</sup> *Id.*

<sup>51</sup> Rockey Decl., Exh. 17 (San Diego County Regional Airport Authority, Staff Report, June 13, 2016, Item No. 13), p. 4 (airport audit reported that “the associated secondary background check have found the TNC’s background check process to be sufficient, consistent and capable”); Rockey Decl., Exh. 18 (San Jose Memorandum re Annual Airport Ground Transportation (Airport), April 18, 2016), p. 4 (100% of TNC drivers passed enhanced background check conducted during San Jose Airport audit).